PROFIL SAUJANA (M) SDN BHD v. AZABAR HOLDINGS

COURT OF APPEAL, PUTRAJAYA
ABDUL WAHAB PATAIL JCA
LINTON ALBERT JCA
BADARIAH SAHAMID JCA
[CIVIL APPEAL NO: B-02-857-05-2014]
1 JULY 2015

CONTRACT: *Sale and purchase of land – Agreement – Validity of – Dispute as to payment of purchase price – Whether usual conveyancing practice that vendor would only release original title deeds and original copy of memorandum of transfer to purchaser on full settlement of purchase price – Whether vendor completed necessary acts to divest itself of beneficial interest in land*

The respondent ('the plaintiff'), a company in liquidation, was the registered owner of two parcels of land ('PM1336 and PM1337'). On 3 July 1992, the plaintiff and the appellant ('the defendant') entered into two sale and purchase agreements for PM1336 and PM1337 and the purchase price was to be paid by the defendant to the plaintiff progressively. After a lapse of 21 years, the plaintiff sought to declare that the agreements were rescinded, cancelled and null and void owing to the failure of the defendant to pay the full purchase price for PM1336 and PM1337 and by reason of effluxion of time. The orders were necessary to enable the liquidator of the plaintiff to proceed with the sale of PM1336 and PM1337. However, the defendant contended that by agreement between the parties, the purchase price for PM1336 and PM1337 was set off against the debt owed by the plaintiff to a related company of the defendant at the material time and that pursuant to the transfer (i) the defendant had surrendered the original title deeds of PM1336 and PM1337 to the law firm handling the transfer; (ii) the defendant had furnished the certified true copy of Form 49 of the plaintiff to the law firm; and (iii) the plaintiff had executed the memorandum of transfer for PM1336 and PM1337. The High Court Judge allowed the plaintiff's claim, this appeal by the defendant. The issue for the court's determination was whether the defendant had paid the full purchase price for PM1336 and PM1337.

Held (allowing appeal with costs; setting aside decision of High Court)
Per Badariah Sahamid JCA delivering the judgment of the court:

(1) The High Court Judge had erred in law in putting the legal burden of proving that the full purchase price had been paid entirely on the appellant who was the defendant in the originating summons. There was also a misdirection in that the High Court had failed to give due weight to the preponderance of evidence that the agreements had been duly executed by the parties. (paras 32 & 34)

(2) A vendor would only release the original title deeds and original copy of the memorandum of transfer to the purchaser/solicitors of the purchaser on full settlement of the purchase price. Based on the evidence, it was apparent that by 1995, the plaintiff had already done all that was necessary to divest itself of the beneficial interest in PM1336 and PM1337 in favour of the defendant. It was inconceivable that the plaintiff would have facilitated the defendant to progress so far as to be on the brink of effecting transfer of PM1336 and PM1337 if full purchase price in whatever form had not been made. (paras 37, 39 & 40)

(3) Further, the action by the liquidator was taken more than 21 years after the agreements were executed in 1992. Although the respondent had been wound up on 19 August 2002, no action was taken to pursue payment of the purchase price on the agreements or to revoke the agreements or demand the return of the original title deeds of PM1336 and PM1337. (para 41)

Bahasa Malaysia *Translation Of Headnotes*

Responden ('plaintif'), sebuah syarikat yang telah dibubarkan, adalah pemilik berdaftar dua bidang tanah ('PM1336 dan PM1337'). Pada 3 Julai 1992, plaintif dan perayu ('defendan') telah memasuki dua perjanjian jual beli bagi PM1336 dan PM1337 dan harga belian sepatutnya dibayar oleh defendan kepada plaintif secara ansuran. Selepas tamat 21 tahun, plaintif memohon untuk mengisytiharkan bahawa perjanjian-perjanjian tersebut terbatal dan adalah batal dan tidak sah disebabkan oleh kegagalan defendan membayar harga belian penuh bagi PM1336 dan PM1337 dan atas alasan bahawa masa telah luput. Perintah tersebut adalah perlu untuk membolehkan pelikuidasi plaintif meneruskan dengan jualan PM1336 dan PM1337. Sebaliknya, defendan menghujahkan bahawa melalui perjanjian antara pihak-pihak, harga belian bagi PM1336 dan PM1337 ditolak selesai terhadap hutang oleh plaintif kepada syarikat yang berkait dengan defendan pada masa material dan bahawa berikutan pindah milik (i) defendan telah menyerahkan surat ikatan hak milik asal PM1336 dan PM1337 kepada firma guaman yang menguruskan pindah milik; (ii) defendan telah memberikan salinan diakui benar Borang 49 plaintif kepada firma guaman tersebut; dan (iii) plaintif telah memeterai memorandum pindah milik bagi PM1336 dan PM1337. Hakim Mahkamah Tinggi membenarkan tuntutan plaintif dan oleh itu, rayuan oleh defendan. Isu yang perlu dipertimbangkan oleh mahkamah adalah sama ada defendan telah membayar harga belian penuh bagi PM1336 dan PM1337.

Diputuskan (membenarkan rayuan dengan kos; mengenepikan keputusan Mahkamah Tinggi)

Oleh Badariah Sahamid HMR menyampaikan penghakiman mahkamah:

(1) Hakim Mahkamah Tinggi telah terkhilaf dari segi undang-undang apabila meletakkan beban pembuktian bahawa harga belian penuh telah diselesaikan sepenuhnya ke atas perayu yang merupakan defendan dalam

saman pemula tersebut. Mahkamah Tinggi juga tersalah arah apabila gagal meletakkan beban yang sewajarnya terhadap keterangan utama bahawa perjanjian-perjanjian tersebut telah dimeterai oleh pihak-pihak.

(2) Seseorang penjual hanya akan melepaskan surat ikatan hak milik asal dan salinan asal memorandum pindah milik kepada pembeli/ peguamcara pembeli selepas penyelesaian penuh harga belian. Berdasarkan keterangan, adalah jelas bahawa sebelum tahun 1995, plaintif telah melakukan segala yang perlu untuk melucut hak daripada kepentingan benefisial dalam PM1336 dan PM1337 memihak kepada defendan. Adalah sukar untuk mempercayai bahawa plaintif akan mempermudahkan defendan untuk meneruskan sehingga ke peringkat pindah milik PM1336 dan PM1337 jika harga belian penuh dalam apa bentuk sekali pun tidak dibuat.

(3) Selanjutnya tindakan oleh pelikuidasi dimulakan lebih 21 tahun selepas perjanjian-perjanjian tersebut dimeterai pada 1992. Walaupun plaintif telah digulung pada 19 Ogos 2002, tiada tindakan yang telah diambil untuk meneruskan bayaran harga belian bagi perjanjian-perjanjian tersebut atau untuk membatalkan perjanjian-perjanjian atau menuntut pemulangan surat ikatan hak milik asal bagi PM1336 dan PM1337.

For the appellant - Lee Chan Leong (Siew Ee Mei with him); M/s Chan Leong & Co
For the respondent - Mishant Thiruchelvam (Saiyidah Izzati Nur Razak Maideen with him); M/s Mishant & Co

[Appeal from High Court, Shah Alam; Suit No: 24-1257-08-2013]

Reported by S Barathi

JUDGMENT

Badariah Sahamid JCA:

Brief Background

[1] This appeal before us is against a decision of the learned High Court Judge given on 4 April 2014 which allowed with costs the plaintiff's originating summons filed by its liquidator on 29 August 2013. The plaintiff had been wound up on 19 August 2002 and is now in liquidation.

[2] In the originating summons the plaintiff had sought to declare two sale and purchase agreements both dated 3 July 1992 between the plaintiff and the defendant in respect of two parcels of land, as rescinded, cancelled and null and void on account of the failure of the defendant to pay the full purchase price and by reason of effluxion of time.

[3] The two parcels of land abovementioned are held under PM 1336, Lot No. 30668, ('PM 1336') and PM 1337, Lot No. 30669, ('PM 1337') both of Mukim of Sungai Buluh, District of Petaling, Selangor. The purchase price of PM 1336 is RM738,435 and PM 1337 is RM 761,748.

A **Plaintiff's Submissions**

[4] The plaintiff's submissions are contained in encl. 1 and supporting affidavits of the plaintiff's liquidator, Kartar Singh a/l Gurchan Singh affirmed on 21 August 2013.

B **[5]** The plaintiff is a company in liquidation pursuant to a winding up order made on 19 August 2002 by the Shah Alam High Court. The plaintiff is also the registered owner of PM 1336 and PM 1337.

[6] On or about 1991 or 1992, the plaintiff proposed to develop PM 1336 and PM 1337 as industrial lots for a project known as Taman Perindustrian
C Sungai Buloh. On 3 July 1992 the plaintiff and the defendant signed two sale and purchase agreements for PM 1336 and PM 1337 ('the agreements'). The purchase price was RM738, 435 and RM761,748 respectively, to be paid by the defendant to the plaintiff progressively in accordance to the third schedule to the agreements. Both agreements contain identical clauses.

D **[7]** On perusing the records of the plaintiff, the liquidator found no documentary evidence that the defendant had made full payment and settlement of the purchase price of PM 1336 and 1337. There is also no evidence that the defendant had paid stamp duty for the transfer of PM1336 and 1337 from the plaintiff to the defendant.

E **[8]** The liquidator also found evidence that the defendant did not pay the quit rent and assessment for PM 1336 and 1337 as required under the agreements. There are arrears of quit rent in the sum of RM107,332.30 for PM 1336 and RM 130,919.60 for PM 1337.

F **[9]** The defendant is a dormant company which has not filed its annual returns with the Companies Commission of Malaysia since 1992 and is not in a position to complete the purchase of PM 1336 and PM 1337.

[10] The agreements between the plaintiff and defendant were executed in 1992 – more than 21 years ago.

G **[11]** After a lapse of 21 years the plaintiff seeks to declare the agreements as rescinded, cancelled and null and void owing to the failure of the defendant to pay the full purchase price of PM 1336 and PM 1337 and by reason of effluxion of time.

H **[12]** The orders sought are necessary to enable the liquidator of the plaintiff to proceed with the sale of PM 1336 and PM 1337.

Defendant's Reply

[13] The defendant's reply is contained in six affidavits in reply to encl. 1, affirmed by various persons, including Mr Ooi Kock Tiong, (deponent of
I affidavit (1) and (4)) who was one of the directors of the plaintiff and had signed the agreements on behalf of the plaintiff.

[14] Mr Ooi had deposed that by agreement between the plaintiff and the defendant, the purchase price of PM 1336 and PM1337 due from the defendant to the plaintiff was to be set off against the debt owed by the plaintiff to Be Te Construction Sdn Bhd, a related company of the defendant at the material time.

[15] Similar contra arrangements for settlement of debts between the plaintiff and the defendant had been carried out involving other associate/related companies of the defendant such as Saga Sentosa Sdn Bhd.

[16] Unfortunately there are no documents to support the aforesaid contra arrangements in respect of PM1336 and PM1337 as the relevant documents which were kept at the premise of Saga Sentosa Sdn Bhd (which has since been wound up by the Johor Bahru High Court on 18 February 2000) were lost and/or could not be located.

[17] The transfer of PM 1336 and PM 1337 had been handled by the law firm of Messrs Azman, Davidson & Co. In pursuant of the transfer, the following measures had been taken by the defendant:

(a) Original title deeds of PM 1336 and PM1337 were surrendered to Messrs Azman, Davidson & Co.

(b) Certified true copy of Form 49 of the plaintiff was furnished to Messrs Azman, Davidson & Co.

(c) The plaintiff had executed the memorandum of transfer (Form 14A) for PM 1336 and PM1337.

[18] On 27 October 1994, both Forms 14A in respect of PM 1336 and PM 1337 were submitted to the stamp duty office for adjudication.

[19] On 3 December 1994 the stamp duty office had issued notices of assessment on the stamp duty payable on both Forms 14A in respect of PM 1336 and PM 1337.

[20] On 26 January 1995, consent was granted by the Petaling Land Office for PM 1336 and PM 1337 to be transferred from the plaintiff to the defendant.

[21] From the above, it is apparent that by 1995 the plaintiff had already done all that was necessary to divest itself of the beneficial interest in PM 1336 and PM 1337 in favour of the defendant. In consequence thereof, the plaintiff had become a bare trustee of PM 1336 and 1337.

[22] Unfortunately, due to miscommunication between the defendant and Messrs Azman, Davidson & Co. with regard to the stamp duty payable on the Forms 14A for PM 1336 and PM 1337, the transfer was not effected.

[23] The matter was further exacerbated when on the expiry of the consent from the Petaling Land Office on 26 January 1996 (12 months from the date of consent) the perfection of the transfer of PM 1336 and PM 1337 was left in abeyance.

A **[24]** Zen Hardware had occupied and utilised PM 1336 and PM1337 since 2002 until to date and had paid for the duties and assessment rates imposed by Majlis Bandaraya Petaling Jaya from 2002 till 2013.

[25] On 23 September 2008, the defendant had executed a sale and purchase agreement with the Zen Hardware in respect of PM 1336 and PM
B 1337.

[26] In the preamble to the sale and purchase agreement, the defendant had made the following representations:

(a) The defendant was the beneficial owner of PM 1336 and PM 1337
C pursuant to the agreements dated 3 July 1992 with the plaintiff.

(b) The defendant had settled the purchase price in full to the plaintiff.

(c) The plaintiff had been wound up by the Shah Alam High Court.

[27] All the arrears of quit rent and penalties payable on PM 1336 and PM
D 1337 were settled by Zen Hardware, after having obtained some exemption on the penalties imposed by the Majlis Bandaraya Petaling Jaya.

[28] On 2 March 2009, Zen Hardware had entered private caveats on PM 1336 and PM 1337 in order to protect their interests.

E **Issues**

[29] The pivotal issue before us is whether the defendant had paid the full purchase price of PM 1336 and PM 1337.

Decision Of High Court

F **[30]** The learned High Court judge allowed the plaintiff's claim. The grounds for the learned judge's decision may be summarised as follows:

(i) there was no documentary evidence of the purported agreement to set off or contra the purchase price of PM 1336 and PM1337 with the debt owing to a related company-Syarikat Te Be Construction.

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(ii) the agreements dated 3 July 1992 made no mention of the set off or contra arrangements.

(iii) there is uncertainty whether the contra arrangement was with Syarikat Jasamurni or Syarikat Te Be Construction.

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(iv) there was no evidence of a resolution from the Board of Directors of either Syarikat Jasamurni/Syarikat Te Be Construction to confirm the existence of the alleged set off or contra arrangement with the plaintiff.

I (v) the defendant failed to provide documentary evidence that Syarikat Te Be Construction or Syarikat Jasamurni are related companies to the defendant.

(vi) the defendant failed to provide documentary evidence that the plaintiff was in fact indebted to either Syarikat Te Be Construction or Syarikat Jasamurni.

(vii) there was no evidence that the defendant had paid stamp duty in respect of the transfer.

(viii) there was no evidence from the solicitors Messrs Azman Davidson & Co. That the full purchase price in respect of PM 1336 and PM 1337 had been paid.

(ix) quit rent and assessment rates in respect of PM 1336 and PM 1337 had been paid by Zen Hardware and not the defendant.

Grounds of Decision

[31] After careful consideration of the appellant/defendant and respondent/plaintiff's submissions as well as the affidavits deposed in the originating summons before the High Court, we are of the unanimous opinion that there is merit in the appeal. We therefore allowed the appeal with costs and set aside the decision of the learned High Court Judge for the following reasons.

[32] We agree with the appellant that the learned High Court Judge had erred in law in putting the legal burden of proving that the full purchase price had been paid entirely on the appellant who was the defendant in the originating summons before the High Court.

[33] The liquidator had failed to seek confirmation from any of the previous directors/managers/officers of the plaintiff of any records or documentary evidence of payment of purchase price. There is also a marked absence of any affidavit from the same on the status of the agreements. This is especially significant considering that the sale and purchase transactions were conducted between 1992-1995, while the liquidator only commenced the originating summons on 29 August 2013.

[34] There was also a misdirection in that the High Court had failed to give due weightage to the preponderance of evidence that the agreements had been duly executed by the parties as demonstrated by the following incontrovertible evidence from the defendant/appellant.

[35] On 3 July 1992 the plaintiff and the defendant had signed two sale and purchase agreements for PM 1336 and PM 1337. ('the agreements') Mr Ooi Kock Tiong, (deponent of affidavit (1) and (4)) was one of the directors of the plaintiff and had signed the agreements on behalf of the plaintiff.

[36] The transfer of PM 1336 and PM 1337 had been handled by the law firm of Messrs Azman, Davidson & Co. In pursuant of the transfer, the following measures had been taken by the defendant:

(a) Original title deeds of PM 1336 and PM 1337 were surrendered to Messrs Azman, Davidson & Co.

A (b) Certified true copy of Form 49 of the plaintiff was furnished to Messrs Azman, Davidson & Co.

(c) The plaintiff had executed the memorandum of transfer (Form 14A) for PM 1336 and PM 1337.

B **[37]** Established and usual conveyancing practice, as deposed by the advocate and solicitor of Zen Hardware, is that the vendor would only release the original title deeds and the original copy of the memorandum of transfer to the purchaser/solicitors of the purchaser on full settlement of the purchase price. To do otherwise would go against common sense and logic.

C **[38]** On 27 October 1994, both Forms 14A in respect of PM 1336 and PM 1337 were submitted to the stamp duty office for adjudication. On 3 December 1994 the stamp duty office had issued notices of assessment on the stamp duty payable on both Forms 14A in respect of PM 1336 and PM 1337.

D **[39]** On 26 January 1995, consent was granted by the Petaling Land Office for PM 1336 and PM 1337 to be transferred from the plaintiff to the defendant. It is apparent that by 1995 the plaintiff had already done all that was necessary to divest itself of the beneficial interest in PM 1336 and PM 1337 in favour of the defendant.

E **[40]** It is inconceivable that the plaintiff would have facilitated the defendant to progress so far as to be on the brink of effecting transfer of PM 1336 and PM 1337 if full purchase price in whatever form had not been made.

F **[41]** It is also telling that the action by the liquidator is taken more than 21 years after the agreements were executed in 1992.The respondent had been wound up on 19 August 2002. However, no action was taken to pursue payment of the purchase price on the agreements or to revoke the agreements or demand the return of the original title deeds of PM 1336 and PM 1337.

G **[42]** For the reasons stated above we find sufficient grounds to allow this appeal with costs.

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